No. 20550

United States Court of Appeals for the Ninth Circuit

NATIONAL FARMERS UNION PROPERTY and CASUALTY COMPANY,

Appellant,

vs.

LAURENCE COLBRESE, JR.,

Appellee.

On Appeal from the United States District Court for the District of Montana.

Appellant's Reply Brief

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Appellant National Farmers Union Property and Casualty Company respectfully replies to the brief interposed herein by the Appellee, as follows:

STATEMENT OF THE CASE

We find on page 2 of Appellee's brief the statement that "the brief of the appellant does not in some respects present accurately and fairly the evidence as it actually exists in the record." We find no further statement in Appellee's brief as to what particular statement made by appellant is unfair or inaccurate. Our examination of appellee's statement of facts does not appear to us to add anything of substance to the statement which appellant provided in its first brief. It does appear that appellee hopes to ameliorate the exclusive possession enjoyed by him of the 1949 automobile and the circumstances under which he enjoyed that exclusive possession. We want to emphasize therefore that the following admissions of fact were admitted by appellee as far back as January 22, 1964, (Tr., Vol. I, p. 19) and that they fairly and accurately represent the record in the case:

> "5. From and since September 2, 1958, said Albert Kinney claims to be the sole owner, and thought himself to be the sole owner of all right, title and interest in and to the said 1949 Ford automobile.
>
> "6. From and since September 2, 1958, said Mrs. Robert McCormick claims no right, title or interest in and to said automobile, and no other person than

said Albert Kinney claimed any right, title or interest in said automobile.

* * *

"8. Said Mrs. Robert McCormick, from and since September 2, 1958, thought that Albert Kinney was the owner of all right, title and interest in and to said 1949 Ford.

* * *

"11. Said Albert Kinney was under the impression that when the estate was finally settled he would get the title certificate issued by the registrar of motor vehicles to the car, with his name endorsed upon it as the certified owner; but that said Albert Kinney "figured the car was" his (p. 17, Kinney deposition).

"12. Said 1949 Ford has been in the possession of Albert Kinney from and since September 2, 1958, and under and subject to his direction and control."

(Tr., Vol. 1, pp. 16, 17)

THE CONTRACT BY KINNEY TO PURCHASE THE FORD WAS NOT VOID, BUT VOIDABLE:

Appellee has not met this contention in his brief.

In the situation of the purchase of the Ford, as it exists between the seller and Albert Kinney, the latter had possession of the Ford under a contract of purchase, but voidable by him. He did not act to void it. In fact, "from and since September 2, 1958, Albert Kinney claimed to be the sole owner, and thought himself to be the sole owner" of the 1949 Ford automobile (Admissions, Tr., Vol. I, p. 16).

Under *Grady v. Livingston (Mont. 1943) 115 Mont. 47, 56; 141 P.2d 346, 350*, the rights of parties under a voidable contract may not be disregarded until they have been declared void by a court having jurisdiction. Moreover the parties may elect to proceed under a voidable contract.

The Montana cases of *Safeco, Sonnek* and *Firemen's Insurance Company of Newark v. Show* are not otherwise explainable except one recognizes the distinction between a void and a voidable contract. In *Sonnek* (Sonnek v. Universal C.I.T. Credit Corp., 374 P.2d 105, 140 Mont. 503) the purchaser had taken direct action to rescind the contract of purchase. In Sonnek, the Montana Court held in effect that when the seller failed to transfer the title there was a failure of consideration and such failure of consideration was a basis for the rescission.

In *Safeco* (Safeco Insurance Company of America v. Northwestern Mutual Insurance Company, 382 P.2d 174, 142 Mont. 155) it is particularly important that the facts do reveal a rescission of the contract by the parties, and a return to the *status quo*. There had been a rescission of the contract, if a contract in fact existed between the parties in *Safeco*. Appellee, in his brief, (page 34) disputes our point here only to the effect that no rescission had occurred on the date of the accident. This,

however, would not affect the status of the parties because even under the holding of Safeco, even after the accident, if the certificate of ownership had been issued, "the transfer then becomes complete and valid and dates back to the time of the transfer between the parties." (382 P.2d, 178) In a void contract it would not be possible for the title to relate back or the transfer to be complete as of the date of the transfer between the parties. So the contract was voidable.

The decision in the *Firemen's Insurance Company* case (Firemen's Insurance Company of Newark, New Jersey v. Show, 110 F. Supp. 523 (U.S.D.C., Mont.)) presents a different facet of the problem. Appellee apparently agrees that the holding by Judge Pray in this case was correct (p. 32, Appellee's Brief) and indeed so does appellant. The appellee, however, in believing that Judge Pray was correct in the *Firemen's Insurance Company* case is not consistent. If Judge Pray had applied the strict meaning of Sec. 53-109 (d), as appellee is contending for here, then he would have held that since the paper title had not transferred to Show the transfer was incomplete and not valid for any purpose. In effect Judge Pray, rightfully as all parties agree, held against the strict terms of the statute. One finds no difficulty in the Pray decision, however, if one realizes that in the *Firemen's Insurance Company* case *the*

purchaser of the automobile had not taken action to rescind the contract. In fact he had taken steps to complete the contract.

In that respect the *Firemen's Insurance Company* case is similar to the case at bar. Here *Albert Kinney has not taken any steps to rescind the contract.* In fact, he "claims to be the owner of the automobile since September 2, 1958," and he has done what he could to complete the contract, including making demands for transfer of the title to him.

As between the seller and Albert Kinney therefore there is in existence a valid, though voidable, contract of purchase.

When the Montana Court, in *Safeco,* states that the title relates back and a transfer becomes complete and valid as of the time of transfer once a certificate of ownership has been issued, it in effect is taking into account the distinction between a void and a voidable contract. In this respect it is in agreement with the holding in *Park v. Franciscus (1924) 194 Calif. 284, 228 Pac. 435,* which stated that the failure of the transferee of the ownership in the car to procure the registration statement does not make the sale "void ab initio." (228 Pac. at page 439)

Incidentally, one receives the impression from appellee's brief that *Park v. Franciscus* is not applicable

here. We disagree. It is a holding, in a sister state, with respect to a provision of statute identical to the provisions in 53-109(d). Regardless of the fact that the State of California later modified its statute to soften the punitive effect of such provisions, the holding in *Park v. Franciscus* is clear, rational and applicable to this case.

We therefore earnestly contend that unless one has in mind the distinction between a void and voidable contract, the decisions in *Safeco* and *Sonnek* by the Montana Supreme Court on the one hand, and a decision by Judge Pray in *Firemen's Insurance Company of Newark, New Jersey,* on the other hand, are incompatible. For if *53-109 (d)* must be strictly construed without respect to the concept of voidable contracts, then Judge Pray was wrong in the *Firemen's Insurance Company* case.

A void contract does not need rescission; it cannot be validated by ratification or made to relate back (17 Am. Jur. 2d 342, 343). A voidable contract, on the other hand, is valid and binding until it is avoided by the party entitled to avoid it (17 Am. Jur. 2d 342, 343, Sec. 7, Contracts).

The situation between the seller and the purchaser of the automobile in this case, *even now,* is that the seller could deliver the certificate of title to the buyer, by whatever means obtained, and the transaction would become complete, and would relate back to the date of

transfer between the parties *(Safeco, 382 P.2d, at 178).*

UNDER STRICT CONSTRUCTION OF 53-109(d) POSSESSION OF THE FORD NEVER TRANSFERRED TO KINNEY.

If the punitive effect of 53-109(d) with respect to the transfer of ownership is to be applied in this case, then there is another portion of that statute, equally punitive, that must also be taken into consideration.

The statute also provides that in the event of failure of transfer of the registration certificate, "delivery of any motor vehicle shall be deemed not to have been made * * *." (Sec. 53-109(d), R.C.M. 1947)

Thus under the strict terms of the statute, if title did not pass, *possession of the automobile did not pass either* and on the date of the fatal accident Jerry Kinney was was not driving the 1949 Ford. Therefore no insurance coverage would attach under this action.

TITLE COULD BE TRANSFERRED TO KINNEY UNDER 53-109(e); IN WHICH CASE 53-109(d) WOULD NOT APPLY.

Appellee reads restrictions into subsection (e) of 53-109 that are not found in its language. There is no restriction preventing the Registrar of Motor Vehicles in Montana from transferring the title to any person lawfully or legally entitled thereto, once the transfer has occurred by operation of law.

Plainly subsection (e) provides that the "successor

in interest" of the person whose title and interest is so transferred may procure a certificate of title.

In this case, the holder of the registered title is C. W. Ehart. He is dead and his estate is being probated; his only heir, Robert W. McCormick, is also dead and his sole heir is Mrs. Robert McCormick. She is not only the only heir and "successor in interest" to the title or ownership of the Ford, but she is also the administratrix of the Ehart estate. Thus she could act as administratrix in procuring the title. For this reason the District Court was correct when it stated in its footnote to its Memorandum Opinion (Tr., Vol. I, p. 40) that in view of this statutory provision there is no reason why the title certificate could not have been endorsed and delivered to Kinney "prior to the completion of the Ehart and McCormick estates." There is in fact no reason otherwise, and this procedure could have been followed *and could now be followed* to transfer the title to Albert Kinney. Once it is admitted that such procedure could occur under subsection (e), then the provisions of subsection (d) do not apply. Appellee does not argue this latter point, although he dismisses it as irrelevant. But nevertheless, both grammatically and historically, the punitive provisions of subsection (d) do not apply to procedures under subsection (e) of the statute.

Under the strict construction of subsection (e) as

contended for by Appellee, the title could not be transferred prior to the completion of the Ehart and McCormick estates. The Ehart estate, at least, would have to be completely probated so as to vest the title in the Robert McCormick estate. Then only, according to appellee's construction of the statute, could Mrs. McCormick get a title in her name, as the heir to the Robert McCormick estate. We have stated in our prior brief, and we state it again, that this contention is an absurdity, and such procedure is certainly unnecessary. There is no statutory reason why title could not be given directly to Kinney in the Ehart estate without waiting for the probate of the McCormick estate. Again, once it is admitted that this could be done under subsection (e) of the statute, then the punitive provisions of subsection (d) do not apply.

THE DEFINITION OF "OWNER" IN SEC. 53-133, R.C.M. 1947 IS APPLICABLE HERE, AND INCLUDES ALBERT KINNEY.

Sec. *53-133, R.C.M. 1947* contains a series of definitions that are to be applied to the motor vehicle registration act in its entirety. With respect to who is an "owner" the section on definitions provides as follows:

> "53-133 (1763). *Definitions.* The words and phrases used in this act shall be construed as follows, unless the context may otherwise require:
>
> * * *

> f. The term 'owner' shall include any person, firm, association or corporation owning or renting a motor vehicle, or *having the exclusive use theref,* under lease or otherwise, and *shall also include a contract vendee."* (Emphasis supplied)

Taking the definition as it stands, Albert Kinney was the "owner" of the 1949 Ford. He had the exclusive use thereof, and had had that exclusive use more than two years. He claimed to own the vehicle and no other person makes any claim thereto. Moreover while he was awaiting the delivery to him of title he was a "contract vendee." Thus, under the statute, Albert Kinney was the "owner" of the automobile and as such the 1949 Ford was not a non-owned automobile under the provisions of appellant's insurance policy.

Appellee's brief (p. 34) contends that the Montana Court in *Safeco* has held that *Sec. 53-133* does not apply. However, that is not precisely what the court said. It made the following statement in *Safeco:*

> "As to Sec. 53-133, R.C.M. 1947, a statute defining words and phrases in the motor vehicle code, it clearly states that their construction shall be 'unless the context may otherwise require.' If there exists any conflict, *which we do not perceive*, in our view the context of Sec. 53-109 requires the interpretation as herein stated." (Emphasis supplied)
>
> *(382 P.2d, at page 179)*

It is clear from the foregoing statement that the Court did not perceive any conflict between the pro-

visions of *Sec. 53-133, R.C.M. 1947* and the facts as they appeared in the *Safeco* case.

It must be remembered that in *Safeco* we had the case of a rescinded contract, if there ever existed a contract between the parties. The exact statement in *Safeco* is that

> "* * * Following Dean's recovery from his injuries either he or his wife took the Hillman car back from the sales lot at Bear Paw and the matter was at an end."
>
> *(382 P.2d, at page 177)*

Thus in *Safeco* we have a situation where it was not possible for the title to relate back to the day of transfer between the parties as is possible in this case. Moreover, there was no exclusive possession of the automobile continuing in the purported buyer in *Safeco,* and certainly he was not a "contract vendee" in the *Safeco* case.

Nothing in the context of *53-109* is in conflict with the context of *Sec. 53-133,* defining "owner," when the facts show, as in this case, that there is an unrescinded contract for sale of the automobile. Even though the transfer is "incomplete" under the terms of *Sec. 53-109(d),* nevertheless the purchaser in the incomplete contract has the exclusive possession of the automobile and is of course a contract vendee. Thus he is an owner within the terms of the definition in *Sec. 53-133.*

Moreover, if, as we contend here, the transfer could

be accomplished under the terms of subsection (e) of *Sec. 53-109, R.C.M. 1947,* then there is no conflict at all with the provisions of *Sec. 53-133,* because, as we have pointed out, if proceedings to transfer title occur under subsection (e) of the recording statute the punitive effect of subsection (d) does not apply.

The definition of "owner" therefore in *Sec. 53-133* is applicable and under it the 1949 Ford was not a "non-owned automobile" in this case. *(Yoshida v. Liberty Mutual Insurance Company, 240 F.2d 824)*

CONCLUSION

Wherefore, the appellant, having fully replied to the brief of the appellee herein, respectfully prays that this Circuit Court of Appeals reverse the judgment of the lower court and direct judgment in favor of the appellant.

Respectfully submitted this ..... day of March, 1966.

WIGGENHORN, HUTTON,
SCHILTZ & SHEEHY

By JOHN C. SHEEHY
Attorneys for Appellant

CERTIFICATE

John C. Sheehy, an attorney duly authorized to practice in the United States Court of Appeals for the Ninth Circuit, states as follows:

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

JOHN C. SHEEHY
Attorney for Appellant

ACKNOWLEDGEMENT OF SERVICE

Due service of the within and foregoing Appellant's Reply Brief and receipt of 3 copies thereof, made and admitted this ..... day of March, 1966.

CROWLEY, KILBOURNE, HAUGHEY, HANSON & GALLAGHER

By LOUIS R. MOORE
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